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No. 71-47

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

JAMES C. WORTH, PETITIONER

v.

UNITED STATES OF AMERICA

REPLY BRIEF

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Battle Creek, Michigan 49014

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REPLY BRIEF

Now comes JAMES C. WORTH, Petitioner, by counsel named below, and submits the following as a reply brief in response to the brief of the United States in opposition to his original petition, the text thereof being limited to the matters argued by the Solicitor General with relation to the claimed lack of knowledge of the United States Attorney of the claim of privilege, and the further claim that the United States Attorney had no alternative to compelling the claim of privilege by counsel representing Petitioner.

ARGUMENT

The brief for the United States in opposition does not materially challenge either the concise statement of the case as made by Petitioner, nor the major legal issues propounded on pages 14 and 23. It is instead limited first to a contention that the record does not support the assertion that the prosecution knew of the intention of the witness (Brief in Opposition, p. 4), and second the assertion (without benefit of authority or discussion of the argument of Petitioner) that he was not denied the effective assistance of counsel.

In the first instance, Petitioner concedes that the present state of the record does not support an affirmative statement of the extent of the actual proven knowledge of the United States Attorney supported by direct evidence, as opposed to what may be reasonably inferred from the events of arrest, charge, dismissal and case theory developed by his opening and closing statements and the evidence introduced by him. On the other hand, neither by direct evidence or inference is there any support whatever for the contention of the

Government, set forth on page 5 of its brief, that:

> "...Petitioner's attorney, whose firm represented Miss Green, did not notify government counsel that Miss Green would refuse to testify, or request that the matter be screened outside the presence of the jury..."

If this is conceded to be the controlling fact issue, Petitioner respectfully submits that this Court should consent to an expansion of the record to make a factual determination of the extent of prior knowledge of the prosecuting authority. This record was not made in the trial court, apparently due to the failure of then trial counsel to recognize the magnitude of error committed by the prosecutor or even the conflict of interests impossible of reconciliation until closing argument. Such tactical error may, if trials are to be conducted solely under the rules of gamesmanship, be charged to Petitioner. If trials are to be conducted seeking justice and in accord with due process of law, it should not.

As stated, the record of direct evidence is silent. Following this argument as an appendix

are duplicates of affidavits now in the possession of the undersigned counsel showing the actual knowledge of the Government trial counsel taking the case without the ambit of the authorities cited by the Solicitor General. These affidavits clearly establish that the Government was aware of the fact that this witness would not testify and certainly there could have been no question in the mind of trial counsel that the privilege would be sustained if claimed where the warrant under which she was charged had been dismissed only eight days prior, and where the evidence theretofore introduced was at least partially aimed towards establishing the guilt of the witness called.

Should the Solicitor General choose to dispute this further at this time, counsel submits that the appropriate remedy would be to remand the cause to the District Court for a hearing limited to the sole issue of the knowledge of trial counsel before determination of this application.

As to the cases cited by the Government in opposition to the argument of Petitioner, all can be distinguished on the facts, and in fact some

lend support to the contentions of Petitioner.

In Welch v. United States, 371 F. 2d 287, cited with reference to the failure of counsel to request screening outside the presence of the jury, the issue was not the compulsion of a privilege claim in the presence of the jury, but rather related to excessive trial publicity and an unproven fear that the jury may have learned that the privilege had been claimed by two witnesses closely associated with the defendant. The appellate court expressly held (at 293) that it knew "of no rule...requiring the acceptance of a claim to personal constitutional privilege before it is asserted and screened outside the jury's hearing." (emphasis added)

In Namet v. United States, 373 U.S. 179, also cited by Petitioner, the witnesses in fact did testify, and the affirming majority pointed out at page 188 that even though the privilege was invoked and sustained as to some questions, "there remained an independent and quite proper reason to call the Kahns as witnesses." This is clearly not the instance in the present case. As further

distinction, it is obvious from Namet that the there prosecutor had legitimate grounds for belief that the privilege could not be invoked by the witnesses called.

In United States v. McKuin, 434 F. 2d 391, the appellate court stressed that the basis of the trial court's ruling was the affirmative representation by the United States Attorney that he did not know the witness was going to "take the Fifth...that it came as a complete surprise to him." (p. 398) The witness there claiming the privilege had also formerly given a statement to the postal inspector (see pp. 397-398) which would support the conclusion that the prosecutor was justifiably surprised.

In United States v. Roselli, 432 F. 2d 879, next cited by the Government, the reviewing court stated that the incidents there complained of occupied only "a few moments in a six-month trial" (p. 903), found the prosecution's motives proper, but still added at 902-3:

> "We do not approve the practice of questioning a witness after he has indicated that he will decline to testify."

In Birns v. Pirini, the defendant took the the stand himself and then refused to answer two questions on cross examination. The court distinguished Maloney and Compton on the basis of express findings that there was no conscious effort by the State to build its case out of inferences arising out of the claim of privilege, and that there was no deliberate attempt by the State to cause appellant to invoke the privilege (see pages 1292-1293).

Under the cases cited by Petitioner in the original application, it is submitted that the same modifications as stated in the above decisions are clearly a part of the rule, but do not apply to the instant case.

Granted a pretrial motion to quash the subpoena served on witness Green should have been made; granted an immediate motion for mistrial should have been made; granted either such motion should have been granted. They were not made; they were not granted. The issues remain, and in all decency should now be faced rather than passed by on the theory that incompetence of trial counsel is forever

tarred to the accused. Cf. Buffalo Chief, cited in the initial brief of Petitioner and ignored by Respondent.

Petitioner further relies on the conflict of interests question raised in the second section of the application, unanswered by the Government except as follows:

> "Petitioner was not denied the effective assistance of his retained counsel by reason of the prosecutor calling Miss Green, as he asserts (Pet. 23-27). Miss Green was not represented by petitioner's lawyer, but by another member of that lawyer's firm, who, while present during the trial, remained silent except for the colloquy concerning Miss Green..." (pp. 5-6)

No authorities are cited; no argument is made. It is submitted that this thesis is singularly inconsistent with the preceding argument that:

> "...Petitioner's attorney, whose firm represented Miss Green, did not notify government counsel that Miss Green would refuse to testify, or request that the matter be screened outside the presence of the jury..."

Professional responsibility extends throughout a partnership or firm, applying equally to partner and associate. This is hornbook law, and it is certainly elementary that one partner cannot

properly act as counsel advising a client whose interests may be in opposition to a party represented by another partner in the same firm.

As to the contention that the prosecutor had no remedy, he could have readily avoided the issue by declining to request issuance of the subpoena, excusing the witness as requested out of the presence of the jury, calling her as a witness without examining her and tendering her to the defense for cross examination, or by motion to strike the appearance in either cause. See argument, supra.

RELIEF REQUESTED: That this Court shall grant relief as originally prayed, or in the alternative remand for an evidentiary hearing as to the extent of knowledge of trial counsel, retaining jurisdiction.

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911 North Eaton Street
Albion, Michigan 49224

ALLEN, WORTH, HATCH & CALDERONE

By _____
Of Counsel
1009 Security Bank Building
Battle Creek, Michigan 49014

Dated: September 10, 1971.

APPENDIX

A F F I D A V I T

STATE OF MICHIGAN)
) ss.
County of Wayne)

WILLIAM P. FINCH, being first duly sworn, deposes and says as follows:

1. That he is a partner in the firm of Finch & Finch, which said firm entered its appearance in the case of United States of America v. James C. Worth, now pending on application for certiorari in the United States Supreme Court as docket number 71-47.

2. That said firm had also entered its appearance as counsel for the defendant in a companion case, the same being United States of America v. Maxine Green, the claim of the Government being that both defendants had aided and abetted the passing of a United States Government check bearing a forged endorsement, the last mentioned cause being disposed of by motion for voluntary dismissal made by the United States Attorney shortly before trial of the first mentioned cause.

3. That division of representation of the two defendants between the firm was made by making it the primary responsibility of deponent to defend James C. Worth, while primary responsibility for defense of Maxine Green was that of Sharon Finch, the other partner in the firm.

4. That immediately prior to the commencement of the trial of James C. Worth, deponent advised John Hausner, then acting as trial counsel for the Government, that the said Maxine Green would not testify if called as a witness other than to identify herself and to claim the Fifth Amendment privilege as a justification for the refusal to testify, and requested Mr. Hausner to release her from subpoena to avoid the loss of her job, since there would be no testimony given which would have a bearing on the facts of the cause, which said request was then and there refused.

5. That deponent is informed and believes that the said Sharon Finch caused to be typed out and given to witness Green the proper language to be used in claiming the Fifth Amendment privilege, and knows of his own knowledge that she was instructed to claim that in response to any and all questions other than her identity; that the said Sharon Finch remained at the counsel table throughout ~~trial~~ for the sole purpose of assisting in the effective claim of Fifth Amendment privilege of witness Green, and that deponent is informed and believes that the said John Hausner was aware of the fact that this was her sole reason for remaining through trial.

FURTHER DEPONENT SAYETH NOT.

s/ William P. Finch
William P. Finch

Subscribed and sworn to before me
this 10th day of September, 1971.

s/ Linda M. Besteni
Notary Public, Wayne County, Mich.
My commission expires: 8/14/73

A F F I D A V I T

STATE OF MICHIGAN)
) ss.
County of Wayne)

MAXINE GREEN, being first duly sworn, deposes and says as follows:

1. That she was subpoenaed as a witness in the cause of United States of America v. James C. Worth in the Federal District Court in Detroit, Michigan on the 14th day of July, 1970.

2. That deponent appeared at the Federal Building in said City pursuant to said subpoena and was present in the hall outside the Courtroom immediately prior to the commencement of trial, at which time there was present in the group John Hausner, Assistant United States Attorney, William P. Finch, and Sharon Finch.

3. That at such time and place, the said William P. Finch advised Mr. Hausner that they had instructed her to claim the Fifth Amendment privilege against any obligation to testify other than to identify herself, that she would not testify, and that "he might as well let her go so that she wouldn't lose her job"; that Mr. Hausner then advised Mr. Finch that he would not release deponent from the subpoena and that she would have to be present in Court throughout the trial.

4. That deponent was instructed prior to trial that she should claim such privilege, and was further given a slip of paper with words to use for the claiming of such privilege that had been prepared by Sharon Finch, who was acting as attorney for deponent.

FURTHER DEPONENT SAYETH NOT.

s/ Maxine Green
Maxine Green

Subscribed and sworn to before me
this 13th day of September, 1971.

s/ Margie Himmelreich
Notary Public, Wayne Co., Mich.
My commission expires: 8/5/75